

## MEMORANDUM

### **New Legislation, Massachusetts General Laws Chapter 156E, Effective December 1, 2012**

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Chapter 238 of the Acts of 2012 recently authorized a new type of entity which will be administered by our Division: the **Benefit Corporation**. Entities may incorporate as benefit corporations or may convert to benefit corporation status effective December 1, 2012. However, they may begin filing Articles of Organization for a benefit corporation with a later effective date of December 1, 2012 up to 90 days prior. The new Chapter 156E, signed into law as part of the Acts, governs the establishment and operation of benefit corporations.

#### ***What are benefit corporations?***

Benefit corporations are corporations organized under Chapter 156A (the professional corporation statute) or Chapter 156D (the business corporations statute) that have elected to be a benefit corporation in their Articles.

Benefit corporations are similar to traditional for-profit corporations but they differ in one important respect. While directors and officers of traditional for-profit corporations must focus primarily on maximizing financial returns to investors, the directors and officers of benefit corporations are expressly permitted to consider and prioritize the social and environmental impacts of their corporate decision-making.

For example, the directors of a traditional for-profit corporation faced with financial difficulty may opt to build up cash reserves by laying off employees in order to fulfill their fiduciary duty to prioritize returns to investors. A benefit corporation's directors faced with similar economic circumstances could prioritize retaining the corporation's workforce through hard times, opting to dip into cash reserves to do so, in order to pursue the corporation's public benefit goals.

Please note that benefit corporations should not be confused with nonprofit corporations, though both types of organizations may have similar public benefit purposes. The assets and earnings of nonprofit organizations must generally be used for the benefit of the public. In contrast, a benefit corporation operates as a for-profit entity; it may distribute earnings to shareholders and otherwise operate for the benefit of its investors. Notice also that Chapter 180, the non-profit statute, does not impact benefit corporations.

#### ***How will benefit corporations be administered?***

##### **I. Becoming a benefit corporation**

New benefit corporations: To establish a new benefit corporation, an entity would organize by submitting Articles of Organization to our Division under Chapters 156A or 156D, either using the forms we provide or following a similar format. However, their Articles must also include:

- 1) In Article II, a clear reference that it is a benefit corporation. (For example, stating that the entity is to be a benefit corporation OR “the corporation shall have the purpose of creating a general public benefit” would both be acceptable). The corporation may also identify specific public benefits that it aims to create. However, *listing specific public benefits alone is not sufficient*.
- 2) In Article VIII, benefit corporations **must** designate one director as their benefit director, a director whose duty it is to oversee and report on the corporation’s public benefit goals. The person named as benefit director of a business corporation must be independent; in other words, he/she may not be simultaneously named to any other positions in the company (i.e. President, Treasurer, employee, etc.). He/she **may** serve concurrently as a benefit officer, should the corporation choose to have one. The benefit director of a professional corporation is not required to be independent.
- 3) In Article VIII, the benefit corporation **may** designate one person as their benefit officer. As mentioned above, this can be the same person as the benefit director. Note that *the benefit director position is mandatory. The benefit officer position is optional*.

Existing corporations who want to become benefit corporations: Existing domestic profit and professional corporations may become benefit corporations by filing Articles of Amendment, amending their Articles of Organization to include the purpose information specified in # 1 above. When converting to a benefit corporation, an existing entity must answer question (5) on the Articles of Amendment as follows:

(5) Approved by:

*(check appropriate box)*

- the incorporators.
- the board of directors without shareholder approval and shareholder approval was not required.
- the board of directors and the shareholders in the manner required by law and the articles of organization.

Existing corporations converting to benefit corporation status must also file a Statement of Change of Supplemental Information to provide for the benefit director required in # 2 above. To maintain the statutory requirement of independence for business corporations, any benefit director may not simultaneously be named to any other positions in the company and may not have held any employee position (other than that of benefit officer), within the company for the past year. Benefit directors may be removed or replaced in the manner provided for in Chapter 156D, consistent with general business corporations.

## **II. Mergers, Conversions or Share Exchanges**

An entity that is not a benefit corporation shall become a benefit corporation subject to Chapter 156E if:

- a) it is a party to a merger, conversion or the exchanging corporation in a share exchange; **AND**

b) the surviving corporation in the merger, conversion or share exchange is to be a benefit corporation.

**III. Law under which benefit corporations are administered**

Benefit corporations under Chapter 156A (the professional corporation statute) or Chapter 156D (the business corporations statute) will be subject to all applicable laws from those chapters, including all the powers, privileges, duties and restrictions that those chapters provide, except as otherwise provided in Chapter 156E and except where inconsistent with that chapter.

**IV. Annual reports for benefit corporations**

Benefit corporations must submit annual reports as specified in Chapter 156A §18 (for professional corporations) or Chapter 156D §16.22 (for business corporations). When filing their annual reports, benefit corporations must also include a **benefit report**. This will come on an Attachment Sheet, be set forth in narrative form, and will describe their activities and progress implementing their public benefit initiative as well as an assessment of the overall social and environmental performance of the benefit corporation measured against a third party standard.

For our purposes, we will file the benefit report with the annual report, so long as it does not include confidential information. There will be a \$75.00 fee for the benefit report in addition to the fee required for the annual report.

**V. Terminating benefit corporation status**

A benefit corporation may terminate its status as a benefit corporation by amending its Articles of Organization to delete the limited purpose information required in # 1 above. Again, in order for the amendment to be effective, the corporation must answer question (5) on the Articles of Amendment as follows:

(5) Approved by:

*(check appropriate box)*

- the incorporators.
- the board of directors without shareholder approval and shareholder approval was not required.
- the board of directors and the shareholders in the manner required by law and the articles of organization.

**Any questions or concerns relative to corporate filings may be directed to Legal Staff of the Corporations Division at 617-727-2853. Questions in any other area should be directed to Holly Ensign-Barstow by email to [Holly@bcorporation.net](mailto:Holly@bcorporation.net) or by telephone to 212-608-4150.**